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October 4, 2022

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Comments on Release Nos. 33-11030; 34-94211; File No. S7-06-22

Dear Ms. Countryman:

We are writing to provide the following supplemental comments in response to the Securities and Exchange Commission's Release Nos. 33-11030; 34-94211; File No. S7-06-22 (the "Release"). As we wrote in our initial submission,[1] we strongly believe that the Commission's proposed rulemaking outlined in the Release (the "Proposal") represents a long overdue overhaul of 17 CFR 240.13d ("Rule 13d") promulgated under Securities Exchange Act of 1934 (as amended, the "Exchange Act") that would bring the United States' system for notifying all investors of an attempt by an influential block holder to change the direction of corporate policy into the 21st century, and to make it more consistent with the original intent of

[1] *See* Letter from Wachtell, Lipton, Rosen & Katz to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Apr. 11, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20123259-279534.pdf ("WLRK Apr. 11, 2022 Comment").

Section 13(d) of the Exchange Act, and with the early-warning systems in the most advanced market economies with which our nation competes.

Quite importantly, the improved Rule 13d that the Commission proposes recognizes that for stockholders in public companies to meaningfully consider the proposals made by Schedule 13D filers, the full economic interests of those filers must be as evident to a company's stockholders as the interests of company management. Such disclosure also provides essential information to the markets more generally, so that all market participants have access to the same information. For too long, Schedule 13D filers have not had to disclose derivative or hedging positions that bear on their long-term interests in the company, the extent to which their interests are consistent with the sustainable profitability of the company, and the duration over which they hold their shares. The Proposal would help Rule 13d better serve this critical purpose — which allows the other stockholders the ability to better assess whether to support or oppose the activist's proposals and provides the markets more generally with full information.

Although the Proposal does not go as far as we have advocated, we do not today write to suggest further strengthening the Commission's proposed amendments to Rule 13d. Our earlier comment of April 11, 2022 addressed those subjects.[2] We recognize that the Commission had to balance many concerns in proposing the updated Rule 13d and consider that the trade-offs it made will result in much better regulation than the status quo.

Rather, our focus in this supplemental letter is to provide the Commission and its staff with some balanced research and facts about the current vibrancy of the U.S. market for corporate control and the openness and competitiveness of our corporate election process *vis-à-vis* those of other jurisdictions. The U.S. market for corporate control is the strongest in the world, and has durably demonstrated that. Moreover, the U.S. system generally requiring the annual election of directors, providing for stockholder votes on major transactions, and giving stockholders the ability to use tools like withhold votes, say-on-pay votes, and Rule 14a-8 proposals to influence corporate policy makes the U.S. system easily usable by activist investors.

By comparison, and without being critical of our economic competitors, their systems are in general relatively more inhibiting to buyers for corporate control, their systems still have more concentrated ownership inhibiting voice from public stockholders, their governments are more likely to intervene directly to prevent changes in control, and their systems tend to discourage negotiated transactions and thus deter bids from many strategic and private equity buyers. Even with that said, however, the market for corporate control and activism is still quite potent in most OECD nations. And to that point, the market for activists in those nations has grown enormously despite having systems for public disclosure comparable to Rule 13d that require public disclosure earlier, at lower ownership thresholds, and that cover all derivative positions (including swaps) that investors hold.

[2] *See id.*

Our goal in submitting this letter is to set forth some facts about these realities that were not discussed by other commentators, primarily because these realities run counter to the arguments they are putting forth. In presenting these facts, we do not attempt to show that corporate takeovers are good or bad in general, or that activism is good or bad in general.[3] Rather, we simply show that the U.S. market for corporate control is the strongest in the world, and that the related, but very different market, for activism is also the strongest in the world. We also make the case that there is no basis, on considering others factors of the U.S. law, for the Commission to be concerned that the modest, incremental changes it is proposing to Rule 13d will deter or materially inhibit the ability of activists to fairly present their case or provide any barrier at all to a strategic or private equity buyer seeking to purchase an entire company. In making that showing, we point out features of other nations' corporate governance and securities systems that appear to have been overlooked, and note that the existence of tighter early-warning system rules in those nations has not inhibited a huge growth in activist campaigns in those jurisdictions.

Finally, we share our view on certain commentators' reaction to the Commission's proposed amendments to the group definition in 17 CFR 240.13d-5 ("Rule 13d-5") that such amendments would put mainstream institutional investors at risk of being deemed part of a group simply because they take a meeting with an activist or management and indicate that they may be inclined to vote in favor of their proposed course of action. We do not read the proposed amendments in that way, and, to the extent there is any possibility of such a strained interpretation, we would be supportive of the Commission providing additional comfort to passive institutional investors that such conduct does not fall within the scope of what the proposed amendments to the group definition intends to, and would in practice, capture.

Comparison to Filing Requirements and Corporate Governance Landscape in Foreign Jurisdictions

The Release noted that "a shorter filing deadline for the initial Schedule 13D also would be consistent with the filing deadlines for similar beneficial ownership reports in foreign jurisdictions."[4] As examples, the Release pointed to the two-business-day rule in Australia, the two-trading-day deadline in the United Kingdom, the German requirement of an "immediate" (but no later than four days) report, and Hong Kong's requirement of a report within three

[3] Although our positions on these topics are widely known, we are not re-hashing or promoting them in this submission.
[4] Release, at 23.

business days.[5] In the same vein, several comments in favor of the Proposal, including our earlier letter, have referenced the shorter time periods in other jurisdictions.[6]

In making that comparison, the Release cautioned that the comparison "may be imperfect" given differences in the legal systems in the United States and foreign jurisdictions.[7] We address a number of those differences below.

In our view, the comparison to the stricter early-warning disclosure regimes in other countries is not flawed; to the contrary, the assumption sometimes advanced that those jurisdictions have in place more "stockholder-friendly" corporate laws that balances out the stricter disclosure rules[8] is not well founded nor is it supported by the facts. The corporate laws of most European countries and, importantly, the real-world context in which they exist, are significantly less "stockholder friendly" and less "activism friendly" than the United States in general, and, particularly, Delaware where a majority of U.S. publicly traded corporations domicile.[9] Specifically:

- The corporate laws of most European countries expressly require corporate managers to act for the benefit of all stakeholders of the corporation, not only stockholders, in

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[5] *See id.* at 23 n.43. In addition, France requires a report within four trading days, see AMF General Regulations, Art. 223-11; French Commercial Code, Art. R.233-1, and Japan requires a report within five days, see Article 14-5, Enforcement Order of the Financial Instruments and Exchange Act; Article 1(1), Law Concerning Administrative Agencies.

[6] *See, e.g.*, Letter from U.S. Senators Tammy Baldwin, Sherrod Brown, Bernard Sanders, Elizabeth Warren, Tammy Duckworth, and Jeffrey A. Merkley to Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, at 2 (July 18, 2022), available at https://www.sec.gov/comments/s7-32-10/s73210-20134696-305888.pdf; Letter from The Society for Corporate Governance to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 6 (Apr. 13, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20123623-279866.pdf; Letter from FundApps to U.S. Sec. & Exch. Comm'n, at 1 (Feb. 25, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20118123-271012.pdf; WLRK Apr. 11, 2022 Comment.

[7] Release, at 23.

[8] This incorrect assumption appears to be shared among some of the opponents of the Proposal. *See, e.g.*, Letter from T. Rowe Price to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 6 (Apr. 11, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20123410-279671.pdf (relying on the notion that the United States has, among other things, "relatively weak shareholder rights profile" to assert that activism provides "a particular important dynamic in the U.S. markets"). Often, poison pills have been cited as one of the reasons for the purportedly stockholder-unfriendly corporate laws in the United States. *See, e.g.*, Letter from Robert E. Bishop & Frank Partnoy to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 7 (Apr. 11, 2022) ("Bishop & Partnoy Letter"), available at https://www.sec.gov/comments/s7-06-22/s70622-20123323-279616.pdf ("Moreover, as the Release recognizes, given the development of poison pills, public company boards are no longer monitored by hostile takeovers, so activism is the remaining recourse. It is important not to inhibit it."); Letter from Irenic Capital Management LP to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 10 (Apr. 11, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20123247-279520.pdf ("[T]he advent of the poison pill effected a seismic shift in the balance of power between corporations and shareholders seeking to acquire large blocks of securities, as the Proposing Release recognizes.").

[9] *See generally* Leo E. Strine, Jr., *The Soviet Constitution Problem in Comparative Corporate Law: Testing the Proposition that European Corporate Law is More Stockholder Focused than U.S. Corporate Law*, 89 S. CAL. L. REV. 1239 (2016).

managing the enterprise. That is the case, for example, in Germany,[10] France,[11] the Netherlands,[12] and the United Kingdom[13] and under the European Union's "harmonization laws" providing for a "European Company" that is required to take into account the interests of creditors, customers, and employees in making business decisions.[14] Similarly, Japanese corporate law has long been known for its stakeholder-centric model.[15]

- That fundamental approach is furthered by the European empowerment of non-stockholder constituencies to influence corporate policy—including via required

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[10] *See* Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 52 (1999) ("[C]orporate law in Germany makes it abundantly clear that shareholders are only one of the many stakeholders on whose behalf the managers must operate the firm."); Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133, 1157 (1999) ("German law takes more seriously the idea that beneficiaries of directors' duties include corporate constituents other than shareholders. . . ."); Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT'L L. 829, 846 (2000) ("German corporate law clearly shows that managers must operate the firm for the benefit of multiple stakeholders, not just shareholders."); Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT'L REV. L. & ECON. 203, 208 (1994) ("Maximization of shareholders' wealth has hardly ever been the objective of German stock corporation . . . .").

[11] *See* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 68 (2003) ("Nor has the French corporate law demanded shareholder-wealth maximization; indeed, it is said to encourage managers to run the firm in the general social interest, for all the players in the firm.").

[12] *See* Geert Raaijmakers & Jos Beckers, *Netherlands*, *in* THE CORPORATE GOVERNANCE REVIEW 280, 293 (Willem J L Calkoen ed., 5th ed. 2015) ("[T]he Netherlands has traditionally followed the stakeholder model, under which management and supervisory board members are required to take into account the interests of all stakeholders when making decisions and performing their duties. According to Paragraph 7 of its preamble, the Corporate Governance Code is based on the principle that a company is a long-term alliance between the various parties involved in the company, such as employees, shareholders and other investors, suppliers, customers, the public sector and public interest groups. Paragraph 8 of the preamble indicates that corporate social responsibility issues must also be taken into account by the management and supervisory boards.").

[13] Section 172 of the Companies Act 2006 imposes a duty on U.K. directors to promote the success of the company:

> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> (f) the need to act fairly as between members of the company.

Companies Act 2006, c. 46, § 172 (UK).

[14] Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 76 (1995).

[15] *See* Steven K. Vogel, *Japan's Ambivalent Pursuit of Shareholder Capitalism*, 47 POLITICS & SOCIETY 117, 118-19 (2019); Carlo Osi, *Board Reforms with a Japanese Twist: Viewing the Japanese Board of Directors with a Delaware Lens*, 3 BROOK. J. CORP. FIN. & COM. L. 325, 326 (2009).

employee participation in management in many European states;[16] the requirements that employees hold at least half of the seats on second-tier supervisory boards in Germany; the requirement that one-third of board seats go to employees or their representatives in Austria, Denmark, Sweden and other E.U. states;[17] and the confirmation and consultation rights granted to "works councils" and other labor organizations in most E.U. countries (including the United Kingdom, Germany and France), as well as under the European Works Council Directive.[18]

- In like vein is the fact that, in the European Union, it remains the case that compared to the United States fewer companies are widely held, with a substantial portion of E.U. public companies having a dominant single stockholder or a family with effective control as a practical matter.[19] For instance, controlled companies, measured by the precedence of a holder or holders of 30% of total voting power, made up about 38% of the MSCI Europe Index companies as of December 31, 2019, whereas the comparable figure for the S&P 1500 companies was about 7% as of October 25, 2015.[20]

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[16] *See, e.g.*, Uwe Blaurock, *Steps Toward a Uniform Corporate Law in the European Union*, 31 CORNELL INT'L L.J. 377, 390 (1998) ("[German] [c]orporate law prescribes a one-third parity or half parity . . . relationship . . . primarily . . . at [the] corporation supervisory board level."); Luca Enriques et al., *The Basic Governance Structure: The Interests of Shareholders as a Class*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 55, 100 (Reinier Kraakman et al. eds., 2d ed. 2009) ("The widespread introduction of employee-appointed directors to the boards of large European corporations is the most remarkable experiment in corporate governance of the 20th century. Many west European countries now mandate employee-appointed directors in at least some large companies. . . ."); Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 735 (2004) ("In France, Ireland, Portugal, and other EU Member States, the law includes aspects of employee participation in corporate governance.").

[17] Licht, *supra* note 16, at 735.

[18] *See* Stephen F. Befort, *A New Voice for the Workplace: A Proposal from an American Works Councils Act*, 69 MO. L. REV. 607, 609 (2004) ("'Works councils are elected bodies of employees who meet regularly with management to discuss establishment level problems.' Most countries in Western Europe legislatively mandate the formation of works councils for enterprises or plants in excess of a certain minimum size." (footnote omitted)); Cunningham, *supra* note 10, at 1142 ("Many continental European countries have gone further than the EC mandates and require that virtually all corporations establish and maintain worker councils."); Parliament and Council Directive 2009/38, art. 1(1), 2009 O.J. (L. 122) 28, 32 (EC), http://eur-lex.europa.eu/eli/dir/2009/38/oj ("The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.").

[19] *See, e.g.*, Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21 J. ECON. PERSP. 117, 117 (2007) ("[T]he fundamental problem of corporate governance in continental Europe and in most of the world is different [from that of the United States]. [In Europe and most of the world], few listed companies are widely held. Instead, the typical firm in stock exchanges around the world has a dominant shareholder, usually an individual or a family, who controls the majority of votes. Often, the controlling shareholder exercises control without owning a large fraction of the cash flow rights by using pyramidal ownership, shareholder agreements, and dual classes of shares.").

[20] *See* BlackRock, Europe's Listed Companies: Their Governance, Shareholders and Votes Cast 3 (Feb. 2020), available at https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-europe-listed-companies-governance-shareholders-votes-cast-february-2020.pdf; Investor Responsibility Research Center Institute et al., Controlled Companies in the Standard & Poor's 1500: A Follow-Up Review of Performance & Risk 15 (Mar.

- Although Japanese companies tend to have stock ownership as dispersed as U.S. or U.K. companies,[21] the corporate structure and culture of lifetime employee-controlled boards, as well as stable shareholder bases, have made Japanese companies resilient against hostile takeovers.[22] Moreover, the traditional Japanese *keiretsu* system of intertwined shareholdings, where banks have extensive investment in industry and industry have extensive cross-ownership, typically insulates management from external market-based monitoring.[23]

- In addition, stockholders of European companies often face "golden shares" held by governmental or other holders that deter (but do not prevent) activism by public stockholders.[24]

- Further deterring activism in the European Union is the fact that annual elections of directors are uncommon, as board terms are typically multiple-year, with the average

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2016), available at https://www.issgovernance.com/file/publications/irrci-controlled-companies-march-2016.pdf; *see also* Institutional Shareholder Services, Presentation to the Vermont Pension Investment Committee 13 (Dec. 20, 2016), available at https://www.vermonttreasurer.gov/sites/treasurer/files/VPIC/PDF/2016/ISS_Presentation.pdf (noting that, as of late 2016, 3.8% and 9.7% of S&P 500 and Russell 3000 companies, respectively, were controlled). As of December 31, 2019, the MSCI Europe Index consisted of about 437 companies from 16 European countries, including France, Germany, Italy, the Netherlands, Switzerland, and the United Kingdom, and the index covered approximately 85% of the free float-adjusted market capitalization across the 16 European countries' equity universe.

[21] *See* MASAHIKO AOKI, CORPORATIONS IN EVOLVING DIVERSITY: COGNITION, GOVERNANCE, AND INSTITUTIONS 72, 156-65 (2010); Julian Franks et al., *The Ownership of Japanese Corporations in the 20th Century*, 27 REV. FIN. STUD. 2580 (2014).

[22] *See* Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, in COMPARATIVE TAKEOVER REGULATION 211, 211 (Umakanth Varottil et al. eds. Oct. 13, 2017).

[23] *See* Joseph C. Sternberg, *The Toshiba Split: A Farewell to Poor Japanese Management?*, WALL ST. J. (Nov. 18, 2021, 6:06 PM ET), available at https://www.wsj.com/articles/toshiba-split-japan-management-division-keiretsu-cross-shareholding-foreign-activist-investor-11637272011; Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871, 872-73 (1993).

[24] *See* Christian Kirchner & Richard W. Painter, *Takeover Defenses Under Delaware Law, the Proposed Thirteenth EU Directive and the New German Takeover Law: Comparison and Recommendations for Reform*, 50 AM. J. COMP. L. 451, 461 (2002) ("France, Portugal and some other countries allow 'golden shares', usually owned by a government agency after a privatization, to have a decisive voice in the governance of many companies. These shares will almost never be tendered to a hostile bidder, making these companies unattractive tender-offer targets."). *See also* Andrei A. Baev, *The Transformation of the Role of the State in Monitoring Large Firms in Russia: From the State's Supervision to the State's Fiduciary Duties*, 8 TRANSNAT'L L. 247, 290 (1995) ("The concept of *special shareholder*, or *golden shareholder*, originated during the British privatization of the 1980s, when the then-state-held firms, such as Britoil and Jaguar, were sold off by Prime Minister Margaret Thatcher's Conservative government. The British Government retained so-called *golden shares* in both these enterprises, allowing the government to outvote all shareholders regardless of the number of shares held by the government. This technique has been employed during privatization by the governments of many countries. . . . In short, the provisions regarding the golden share enable the government to exercise a certain control over a privatized enterprise after the state has become a minority shareholder or even after total privatization. Thus, a golden share empowers the state with a control disproportionate to the state's equity in an enterprise. This 'authority-giving' quality of the share makes it 'golden' in the eyes of ordinary shareholders.").

European directors being up for election only every three or four years (as compared to the United States where all directors typically have to stand for election every year).[25]

- The oft-cited E.U. Takeover Directive's "non-frustration rule"—ostensibly protective of a bidder's ability to present a takeover offer directly to the stockholders of its target (albeit not designed to facilitate target stockholders receiving the best price available in a sale of control)—has been opted-out of or limited across the European Union; the non-frustration rule, even where adopted, is inoperative under the "reciprocity rule" if the offer is from a bidder from a nation that does not have a non-frustration rule[26]—which includes not only the United States but also Japan, Canada, and Australia, as well as Germany, France, and the Netherlands that have themselves opted out of the non-frustration regime; and, further, the non-frustration rule is not accompanied by (and is in fact inconsistent with) any duty to seek out the highest value available in a sale of the company[27]—in contrast to the approach of Delaware (and other U.S. states) which enable and at times require boards to generate market competition and seek out the highest value reasonably available in a sale of the company.[28]

- Takeover defenses even stronger than a poison pill may be deployed in Europe. By way of a prominent example, Dutch law has allowed boards to employ a *stichting*, an anti-takeover device by which a board would create a separate legal foundation that is

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[25] *See* Lucian A. Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 897 (2002).

[26] *See* Parliament and Council Directive 2004/25, art. 12, 2004 O.J. (L 142) 12, 21 (EC), http://eur-lex.europa.eu/eli/dir/2004/25/oj. As a matter of economic reality, the non-frustration rule without the reciprocity rule has been relegated to a "minority" position, with the leading E.U. economies of Germany, France and the Netherlands opting out of the non-frustration rule and other leading E.U. economies of Italy and Spain opting in for the non-frustration rule but also adopting the reciprocity rule. *See* European Commission, "Report on the application of Directive 2004/25/EC on takeover bids" (Brussels, 28 June 2012) COM (2012) 347 final, para. 7; Raphaële Francois-Poncet et al., *France's Takeover Regime Undergoes Major Reform*, BLOOMBERG L. (Apr. 9, 2014), available at https://news.bloomberglaw.com/securities-law/frances-takeover-regime-undergoes-major-reform.

[27] *See* David Kershaw, *The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition*, 56 INT'L & COMP. L. Q. 267, 270 (2007) ("[O]nce the company is placed in play [takeover defenses] allow the board to determine a sale strategy and control the sale process: a controlled process is likely to result in a higher premium than an uncontrolled auction."). *See also, e.g.*, John Close, *Spain's Labyrinth: The Endless Pursuit of Endesa*, 7 M&A J. 2 (2007), *reprinted in* M&A INTERNATIONAL MEDIA AWARDS 2007: WINNING ARTICLES BOOK 46, 47 (discussing Spanish rules that hampered Endesa from running an effective auction, including the non-frustration rule, the lack of withdrawal rights, a limit on raising its bid, and a rule that prevented its bid from having a timing advantage over a competitor bid).

[28] *See, e.g.*, *Paramount Commc'ns Inc.* v. *QVC Network Inc.*, 637 A.2d 34, 44 (Del. 1993) ("In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end."); *Revlon Inc.* v. *MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (holding that when a change of control is inevitable, the board is duty bound to maximize "the company's value at a sale for the stockholders' benefit").

given control over a large block of company stock and that could doom any takeover bid to failure if it fails to support the bid.[29] And even much more powerful than an American poison pill used by a board subject to removal at a ballet box is a national or regional government bent on defeating a takeover bid that it believes will result in the loss of a "national champion," and the flexing of such muscle has occurred a number of times in Europe, including the French government's involvement in the 2004 battle between Sanofi-Synthelabo SA, a French company, and Novartis AG, a Switzerland-based company, for acquiring a controlling equity stake in Aventis SA, a French company, and the German government and the state of Lower Saxony's efforts to counter Porsche Automobil Holding SE's fight for control over Volkswagen AG in the late 2000s.

In contrast, there is a well-established corporate law and governance system in place in the United States—and in Delaware in particular—that is receptive to and protective of stockholder activism. Specifically:

- It is typically the case that all directors stand for election annually, and even where that is not the case (for those companies with classified boards), a third of the board is vulnerable each year, giving activists constant leverage at the ballot box. Staggered boards have markedly receded in recent years to the point that only 62 of the S&P 500 companies had staggered boards at the end of 2021, compared to 126 and 294 of the S&P 500 companies having staggered boards at the end of 2011 and 2001, respectively.[30] Similarly, only 392 of the S&P 1500 companies had staggered boards at the end of 2021, compared to 608 and 919 of the S&P 1500 companies at the end of 2011 and 2001, respectively.[31]

- Likewise, the adoption of so-called majority voting policies that allow activists to pressure board members without even running alternative candidates by turning a withhold decision into a non-retention referendum has added to the leverage activists have and their low-cost options. At the end of 2021, 89.77% of the S&P 500 companies and 45.97% of the Russell 3000 companies had adopted the majority voting standard, which are significant increases from 73.5% of the S&P 500 companies and 26.5% of the Russell 3000 companies, respectively, at the end of 2010.[32] Moreover, there was a big jump in the percentage of the S&P 500 companies adopting a form of majority voting from 16% in February 2006 to 66% in November

[29] *See* Kobi Kastiel, *Global Antitakeover Devices*, 36 YALE J. REG. 117, 131 (2019); *see also* Shayndi Raice et al., *The Rise of the 'Stichting,' an Obscure Takeover Defense*, WALL ST. J. (Apr. 22, 2015), available at https://www.wsj.com/articles/the-rise-of-the-stichting-an-obscure-takeover-defense-1429716204.
[30] *See* FactSet Research Systems, The Classified Boards Year over Year Profile Report (retrieved Sept. 28, 2022), available at https://my.apps.factset.com/oa/cms/oaAttachment/55e104a2-8e7a-4e03-b9d5-65a6be966d8e/26954.
[31] *See id.*
[32] *See* FactSet Research Systems, Takeover Defense Trend Analysis (retrieved Sept. 28, 2022), available at https://my.apps.factset.com/oa/cms/oaAttachment/5510e202-0993-42a4-a1aa-94ae853bb5e4/26954.

2007, largely in response to a large number of stockholders proposals demanding adoption of a majority voting standard during the 2006 proxy season.[33]

- Any danger of board-level "structural bias" against activists (or takeovers) has been further reduced by the fact of the increasing percentage of non-employee independent directors on U.S. public company boards. For instance, the CEO is the only non-independent director on the board of 64% of the S&P 500 companies based on their proxy statements filed between May 28, 2020 and May 13, 2021, compared to 52% and 49% of the S&P 500 companies 10 and 18 years ago, respectively.[34]

- Proxy advisory firms (*e.g.*, ISS and Glass Lewis) have emerged as effective policers of corporate conduct, including their published policies of recommending against certain takeover defenses and governance structures, and recommending withhold votes in a variety of circumstances that serve to discourage deterrence of activism—including effectively disallowing any board-adopted rights plan/poison pill having a duration of over one year.[35]

- The effectiveness of stockholder voice is seen in the decline in the prevalence of shareholder rights plans. At the end of 2001, about 60% of the S&P 500 companies had standing poison pills in place.[36] Given the strong rights given to stockholders under state and federal law to influence the direction of company policies, stockholder advocacy against pills has been enormously successful. The adoption of poison pills has now declined to the degree that only six S&P 500 companies had a plan (inclusive of a net operating loss ("NOL") protective plan)[37] in place at the end of 2021, compared to 51 and 301 S&P 500 companies having a plan at the end of 2011 and 2001, respectively. Similarly, only 26 S&P 1500 companies had a plan in place at the end of 2021, compared to 229 and 914 S&P 1500 companies having a plan at the end of 2011 and 2001, respectively. Consistent with this trend, among all U.S.-incorporated companies, 141 had a pill in place at the end of 2021, compared to

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[33] *See* Claudia H. Allen, Study of Majority Voting in Director Elections, at 2, 5-6 (Nov. 12, 2007), available at https://katten.com/Files/45102_FINAL%20%20MAJORITY%20VOTE%20SURVEY.pdf.

[34] *See* Spencer Stuart, 2021 U.S. Spencer Stuart Board Index, at 9 (Oct. 2021), available at https://www.spencerstuart.com/-/media/2021/october/ssbi2021/us-spencer-stuart-board-index-2021.pdf; Spencer Stuart, 2014 U.S. Spencer Stuart Board Index, at 8 (Nov. 2014), available at https://www.spencerstuart.com/~/media/PDF%20Files/Research%20and%20Insight%20PDFs/SSBI2014web14Nov2014.pdf.

[35] *See generally* Institutional Shareholder Services, United States Proxy Voting Guidelines Benchmark Policy Recommendations (Dec. 13, 2021), available at https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf; Glass Lewis, 2022 United States Policy Guidelines (Nov. 2021), available at https://www.glasslewis.com/wp-content/uploads/2021/11/US-Voting-Guidelines-US-GL-2022.pdf.

[36] *See* FactSet Research Systems, Poison Pills in Force Year over Year Profile Report (retrieved Sept. 28, 2022), available at https://my.apps.factset.com/oa/cms/oaAttachment/12233832-4269-4aa0-aa7c-1d6d6b1683a1/26954.

[37] An NOL protective plan is meant to preserve tax benefits of a company's net operating losses, and thus represents a different context than a defense against a traditional activist attack. The FactSet poison pill dataset, which covers year-end information starting from 1998, is available only in the form inclusive of NOL protective plans.

734 and 2,218 of all U.S.-incorporated companies at the end of 2011 and 2001, respectively.[38]

- Relatedly, at the end of 2021, no S&P 500 company, 12 S&P 1500 companies, and 68 U.S.-incorporated companies had a non-NOL protective plan in place. In contrast, at the beginning of 2017, 12 S&P 500 companies, 57 S&P 1500 companies, and 194 U.S.-incorporated companies had a non-NOL protective plan in place.[39]

- The incidence of low-threshold poison pills, which is more prohibitive of shareholder activism by limiting the percentage of shares that can be acquired without triggering the pill, is relatively low. Of the six S&P 500 companies, 43 S&P 1500 companies, and 145 U.S.-incorporated companies that adopted a non-NOL poison pill on or after January 1, 2017 and before September 28, 2022, only one S&P 500 company, four S&P 1500 companies, and 12 U.S.-incorporated companies, respectively, had such pill with a threshold trigger of below 10%.[40]

- U.S. M&A markets have been remarkably robust in the last few decades, it has never been easier to present a takeover bid given the low incidence of defenses and the prevalence of boards with supermajority of independent directors, and it continues to be the case that hostile takeover bids are made.[41] Often forgotten is that there is no need to make a hostile bid if a private approach can be made to a company that has no classified board and where the directors are willing to consider in good faith a proposal that might be good for the company and its stockholders. Because hostile bids are rarely necessary and are more expensive to bidders given the evolutions in governance we have discussed, the incidence of hostile bids is not the best measure of the vibrancy of U.S. M&A markets; the incidence of valuable M&A transactions for public company stockholders is likely a better proxy.

- The Proposal's modest tightening of blockholder disclosure is further justified by the increasing effectiveness of activist campaigns and their decreased cost due to advances in information technology and the rise of concentrated economic ownership in the United States. It has never been more feasible to run cost-effective activism campaigns, given the current market environment in which little more than 10 to 15 institutions are the target audience. In addition, the Commission's new universal

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[38] *See* FactSet Research Systems, Poison Pills in Force Year over Year Profile Report (retrieved Sept. 28, 2022), available at https://my.apps.factset.com/oa/cms/oaAttachment/12233832-4269-4aa0-aa7c-1d6d6b1683a1/26954.
[39] *See* Deal Point Data, Governance Screening (retrieved Sept. 28, 2022). The Deal Point Data coverage for pill information starts from January 1, 2017.
[40] *See id.*
[41] *See* Evercore, Navigating Today's Hostile Environment (Sept. 2022); USA News Group, *Hostile and Friendly Takeovers on the Rise Again in an Reinvigorated M&A Market*, BLOOMBERG (Apr. 12, 2022, 1:10 PM ET), available at https://www.bloomberg.com/press-releases/2022-04-12/hostile-and-friendly-takeovers-on-the-rise-again-in-a-reinvigorated-m-a-market; *Trends in Hostile M&A*, FIN. WORLDWIDE MAG. (Feb. 2022), available at https://www.financierworldwide.com/trends-in-hostile-ma.

proxy rule has created another tool available to activists, allowing activists to run a contest more cheaply and engage in elective surgery of a board more easily. It is not surprising, therefore, that successful activism campaigns have been run by stockholders with relatively small stakes, often below or well below 5%.[42] According to FactSet, the number of successful campaigns against U.S.-headquartered companies, by activists with stakes of equal to or below 5% and with the objectives of board representation or control, meaningfully increased during the past two decades (before Covid-19 muted such activist campaigns):[43]

Jurisdiction	2001	2006	2011	2016	2019	2021
United States	5	3	7	11	19	4

- The Delaware courts have been vibrant in exploring the fiduciary duties of directors to protect the stockholder vote franchise, holding that infringement on that franchise is impermissible absent the demonstration of a "compelling justification."[44] Moreover, they have been vigilant in preventing the use of low-threshold pills designed to deter activism—specifically ruling, recently in *Williams* where the Court of Chancery enjoined a 5% "anti-activist" pill adopted at the outset of the Covid-19 pandemic, that deterring activism is not a legitimate corporate purpose sufficient to justify the adoption of a rights plan.[45] These recent decisions are consistent with the Delaware courts' long-standing tradition of preventing incursions on the stockholder franchise, as reflected, for example, in two decisions where the Court of Chancery

[42] Notable recent examples include Engine No. 1's parlaying a 0.02% stake in Exxon Mobil Corporation into winning three seats on Exxon's 12-member board after a proxy fight, and Starboard Value LP's reliance on its 1.9% stake in Corteva, Inc. to enter into an agreement with the company, pursuant to which three directors proposed by Starboard joined Corteva's board and were included as part of Corteva's director slate for the upcoming annual election. *See* Svea Herbst-Bayliss, *Little Engine No. 1 Beats Exxon with just $12.5 mln*, REUTERS (June 29, 2021, 6:45 PM ET), https://www.reuters.com/business/little-engine-no-1-beat-exxon-with-just-125-mln-sources-2021-06-29; Pippa Stevens, *Engine No. 1 Wins at Least 2 Exxon Board Seats as Activist Pushes for Climate Strategy Change*, CNBC (May 26, 2021, 1:18 PM ET), https://www.cnbc.com/2021/05/26/engine-no-1-gets-at-least-2-candidates-elected-to-exxons-board-in-win-for-the-activist.html; Corteva, Inc. *Corteva Enters Agreement with Starboard Value*, PR NEWSWIRE (Mar. 19, 2021, 08:00 AM ET), https://www.prnewswire.com/news-releases/corteva-enters-agreement-with-starboard-value-301250742.html; Letter from Starboard Value LP to Gregory R. Page, Chair of Board, Corteva, Inc. (Jan. 21, 2021), available at https://sec.report/Document/0000921895-21-000112.

[43] *See* FactSet Research System, Universal Screening – Activism/Governance – Starter Screen Campaign (retrieved Sept. 28, 2022).

[44] *See Blasius Indus.* v. *Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

[45] *See William Cos. St. Litig.*, 2021 WL 754593 (Del. Ch. Feb. 26, 2021), *aff'd*, 264 A.3d 641 (Del. 2021). In its post-trial opinion, *Williams* applied Delaware's *Unocal* standard requiring a board to show that it had "reasonable grounds for concluding that a threat to the corporate enterprise existed" and that its conduct was "reasonable in relation to the threat posed." *Williams* rejected as insufficient a board's "desire to prevent stockholder activism during a time of market uncertainty." The Delaware Supreme Court affirmed on the basis of the reasons given in that opinion. In light of *Williams*, the Release's reference to "low-threshold poison pills that are permitted under Delaware law," Release, at 23 n.43, should not be taken broadly. *Williams* makes clear that low-threshold anti-activism pills are *not* permissible under Delaware law and its application of the long-standing requirements of *Unocal*.

prevented management from using so-called "proxy puts" in company debt agreements as a weapon against a proxy fight to replace the board.[46]

- The absence of federal or state "mandatory bid" requirements leave stockholders free to acquire large positions without becoming obliged to acquire the entire company (mandatory bid requirements exist in a large number of European countries).

- The comparatively widely dispersed nature of the public company stockholder profile in the United States provides greater opportunities for activism, as does the absence of governmental protectionism against takeovers or other free market dynamics.

Accordingly, the force of the comparison to filing requirements in foreign jurisdictions is not diminished by differences between the corporate law systems in the United States and those foreign jurisdictions.

Data on Activism in Foreign Jurisdictions

The relevance of the Release's comparison to filing requirements in Australia, the United Kingdom, Germany, France, Hong Kong, and Japan is further buttressed by data showing that, notwithstanding those stricter disclosure requirements and the inhibitions on activism arrayed above, activism has grown and has been on the rise in those foreign jurisdictions. Accordingly, there is no rational basis for concern that the proposed tightening of the filing window—which is a small incremental change in the U.S. corporate law and governance ecosystem—will meaningfully reduce activism in the United States.[47]

According to Insightia (f/k/a Activist Insight), the number of companies that were headquartered in these foreign jurisdictions and the United States and were subject to public activist demands in 2013, 2019, and 2021 was:[48]

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[46] *See Kallick* v. *SandRidge Energy, Inc.*, 68 A.3d 242 (Del. Ch. 2013); *San Antonio Fire & Police Pension Fund* v. *Amylin Pharm., Inc.*, 981 A.2d 1173 (Del. Ch. 2009).

[47] Although not generally acknowledged, those supporting the activists often argue that a shorter window by definition means that fewer shares can be acquired before the required public disclosure, resulting in the activist's inability to make enough money to justify its activist campaign. But the key purpose of the Williams Act was to require market disclosure by persons seeking to influence or control a public company, rather than to make activists more profitable by allowing them to acquire additional shares before the marketplace is informed of their positions. *See, e.g.*, S. Rep. No. 550, 90th Cong., 1st Sess. 2, at 7 (1968) (indicating that Section 13(d)'s purpose is to provide shareholders with relevant facts concerning persons who have acquired substantial interests); Allen E. Kelinsky, *Promoting Shareholder Equality in Stock Accumulation Programs for Corporate Control*, 36 AM. U. L. REV. 93, at 100 (1986) ("The purpose of section 13(d) is to provide shareholders with relevant facts affecting the stock's market price and a fair opportunity to evaluate these changes in light of stock accumulation that may result in a change in the company's management or control."). The fact that activism occurs in countries requiring much earlier disclosure triggers strongly suggests that the activists are still able to make a sufficient initial investment to pursue their activist campaigns.

[48] *See* Activist Insight, Shareholder Activism in 2019, at 5 (Jan. 2020); Activist Insight, Activist Investing in Asia at 16 (undated); Insightia, Shareholder Activism in H12022, at 5 (July 2022).

Jurisdiction	2013	2019	2021
United States	326	560	461
Australia	70	81	67
Japan	15	68	65
United Kingdom	35	58	49
Germany	15	41	44
France	5	12	11
Hong Kong	8	14	9

Putting aside the general decline in such figures for these jurisdictions since 2019 as a result of Covid-19, which temporarily dampened the markets for activism globally,[49] these trends paint a clear picture that activist engagements in all such foreign jurisdictions have been on a steep rise during the last decade leading up to the onset of the global pandemic.

Moreover, in Australia, the number of board seats that activists gained whether by contested votes or settlement went up from 23 seats in 2014 to 42 seats in 2019.[50] In the United Kingdom, activists gained at least one board seat in nine campaigns in 2013, whereas they were successful in doing so in 22 campaigns in 2019.[51] In Japan, the number of Japan-based companies publicly subjected to activist demands for board representation went up from one in 2014 to 22 in 2019.[52]

In addition to the above time-trend analysis, a cross-sectional observation further supports the view that the tighter reporting requirements are not impediments to the vibrancy of a market for activism. For each of 2019 and 2021, the jurisdictions at issue ranked in the world as follows in terms of the number of companies that were headquartered in each jurisdiction and were subject to public activist demands:[53]

[49] *See, e.g.*, Activist Insight, COVID-19: The Impact on Shareholder Activism 4, available at https://www.activistinsight.com/research/COVID19_ActivistInsight.pdf; Svea Herbst-Bayliss, *Coronavirus Hurts Corporate Activism as M&A, Buybacks Decline*, REUTERS (Apr. 6, 2020, at 9:01 AM ET), available at https://www.reuters.com/article/health-coronavirus-activists/coronavirus-hurts-corporate-activism-as-ma-buybacks-decline-idUSL2N2C330R; *see also* Lazard, 2020 Review of Shareholder Activism 1, 3, 6 (noting a "pause" in global activism environment during the first six months of the pandemic, followed by a sharp rebound during the fourth quarter of 2020).

[50] *See* Activist Insight, Shareholder Activism in 2019, at 14 (Jan. 2020).

[51] *See* Activist Insight, Shareholder Activism in the UK, at 9 (July 2020).

[52] *See* Activist Insight, Shareholder Activism in Japan, at 9 (May 2020).

[53] *See* all sources cited in *supra* note 48. The ranking information for 2013 could not be obtained.

Jurisdiction	2019	2021
United States	1st	1st
Australia	2nd	2nd
Japan	3rd	3rd
United Kingdom	5th	4th
Germany	6th	5th (tied)
France	8th	10th
Hong Kong	9th	11th

The table supports the view that, putting aside the United States—which is unmatched in the world in terms of activist activities—these foreign jurisdictions with stricter reporting deadlines and less shareholder-friendly corporate law and governance systems rank the highest in the world in terms of the number of public activist demands.

Group Definition Amendments

We also write to express surprise over another feature of the record. Some commenters seem to read the measured amendments to the group definition in Rule 13d-5—*which in large part appear designed simply to adhere the rule to the underlying statutory language in Section 13(d)(3) of the Exchange Act*—as putting mainstream institutional investors at risk of being deemed part of a group simply because they take a meeting with an activist or management and indicate that they may be inclined to vote in favor of their proposed course of action.[54]

Although we have raised legitimate concerns in the past about activist investors engaging in concerted activities within the group definition of the statute but evading Rule 13d compliance,[55] our concerns have never been about this scenario. Rather, we have noted that it is

[54] *See, e.g.*, Letter from Investment Company Institute to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 20 (Apr. 7, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20122777-279139.pdf; Letter from Jeffrey M. Gordon to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 6 (June 20, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20132543-303070.pdf ("Gordon June 20, 2022 Comment"); Letter from Ceres Investor Network to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 3-4 (Apr. 11, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20123442-279690.pdf; Letter from Neuberger Berman Group LLC to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 2 (Apr. 1, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20123215-279495.pdf; Letter from Managed Funds Association to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n, at 9-10 (Apr. 1, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20123269-279539.pdf; Bishop & Partnoy Letter, at 9.

[55] *See, e.g.*, Wachtell Apr. 11, 2022 Comment; Wachtell, Lipton, Rosen & Katz, The SEC Should Address the Risk of Activist "Lightning Strikes" (Mar. 11, 2021), available at https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.27398.21.pdf; Wachtell, Lipton, Rosen & Katz, Activist Abuses Require SEC Action on Section 13(d) Reporting (Mar. 31, 2014), available at https://corpgov.law.harvard.edu/2014/03/31/activist-abuses-require-sec-action-on-section-13d-reporting.

quite possible for joint action to influence the control or policies of a public company to exist without a written contract, and that evidence, for example, that a meeting among activist funds, followed by an immediate pattern of acquisitions of company stock by all participants, can be considered, under the statute, by regulators and courts as one piece of evidence to be considered on the subject of whether a group existed. The Release itself focuses on this type of direct evidence, which links discussions of a plan to influence control and policy with trading in the company's securities, particularly at a time before any party has filed a Schedule 13D.

We did not and do not view the Release as propounding a group definition that would consider a regular passive institutional investor, say a mainstream mutual fund or ETF, as a member of a group with an activist simply because it met with the activist, heard its proposed plans, and signaled that it would likely use its voting power to support the activist's proposed campaign. Mainstream investors regularly take meetings with management and with activists, and that is an important part of our corporate governance system. Such investors, we note, seem to never—a word we use advisedly—give irrevocable proxies to anyone, and are quite candid in acknowledging that they consider all facts and circumstances until the votes must be cast. In our view, the proposed amendment language on the group definition cannot be reasonably read as extending to this scenario, and we would encourage the Commission to give comfort to the mainstream institutions who have expressed concern, perhaps at the instance of others who have read the proposed amendments in an extreme way because they in fact oppose other features of the release, so that their concerns are alleviated.[56]

Another reason why do not believe that the proposed amendments to Rule 13d-5 can be read in the distorted way that some fear is that there is a lineage in this space. When the determination of the validity of a shareholder rights plan was originally under consideration in Delaware, opponents took the view that the rights plan swept too broadly because it would sweep

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[56] In order to alleviate those concerns and to conform the text of the proposed Rule to the description of it in the Release at, for instance, pages 11, 84-88, we suggest that the following italicized words be added to the proposed Rule 13-5(b)(1)(ii):

> A person that is or will be required to report beneficial ownership on Schedule 13D who, in advance of making such filing, directly or indirectly discloses to any other market participant the non-public information that such filing will be made, acts as a group with such other person or persons within the meaning of section 13(d)(3) of the Act to the extent such information was shared with the purpose of causing such other person or persons to acquire equity securities of the same class for which the Schedule 13D will be filed *and in response to this inducement such other person or persons acquire such equity securities before such filing*, and such group will be deemed to have acquired any beneficial ownership held in the same class by its members as of the earliest date on which such other person or persons acquired beneficial ownership based on such information. *If the person who receives such an inducement is a passive investor who is required to file on Schedule 13F or 13G and has done so before the meeting at which the inducement is made, the presumption shall be that the person is not a member of the group unless it is proven by clear and convincing evidence that any purchases made before the filing of the Schedule 13D by the party making the inducing statements were made directly in response to the inducement and on the basis of the non-public information conveyed.*

into its affiliate definition investors who gave a revocable proxy to the takeover bid to which the rights plan applied. The Delaware Supreme Court made clear that the granting of a revocable proxy did not make the giver an affiliate of the bidder under the rights plan.[57]

That reasoning is applicable here and we understood it to apply to and delimit the Commission's proposed amendments to the group definition. To avoid any misunderstanding, the Commission might make clear that, to the extent any passive institutional investor meets with management, an activist, or any person with an intention to change or influence control of the issuer, and simply indicates that it intends to support that person's position at the ballot box, that conduct does not make a passive institutional investor a member of a group with the party seeking to influence control or company policy. So long as a passive institutional investor (including a Schedule 13G filer) continues to qualify and act as such, it would then have no reason to be inhibited in continuing to meeting with both sides in contested situations, or to spend time with activists and hear their ideas even before a Schedule 13D is filed. As to this point, we note that there is a categorical difference between mainstream investors and follow-on activist funds in terms of the group definition consideration. Activists and potential bidders for control want to meet with mainstream investors because those investors already have substantial ownership positions in the company. Follow-on activists, by contrast, involve funds that seek to profit from and aid the lead activist's control and influence efforts and to buy stock in the company as a consequence of being informed of the primary activist's plans, supporting those plans, and using the information of those plans to acquire stock before a Schedule 13D is filed; *i.e.*, being part of the so-called "wolfpack." That behavior has never been, to our knowledge, engaged in by mainstream passive institutional investors, such as the leading mutual and index fund complexes. To further alleviate any concerns by institutional investors that they would be unwittingly "pulled" into a group simply as a result of a meeting with an activist, we would also support clear language in the rule (and the Release) indicating that meeting with activists and companies in connection with (or determining whether to proceed with) a proxy contest would not trigger Schedule 13D group filing requirements on their own, nor would disclosure by an institutional investor of its intention to vote a certain way trigger Schedule 13D "group" disclosure.[58]

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We again applaud the Commission's work in proposing much needed amendments to modernize aspects of the beneficial ownership reporting rules that would make the rules more consistent with the original intent of Section 13(d) of the Exchange Act and with the comparable rules of the most advanced foreign market economies where, despite tighter

[57] *See Moran* v. *Household Int'l, Inc.*, 500 A.2d 1346, 1355 (Del. 1985).

[58] We note that some scholars have recently suggested that the Commission "impose a prohibition on tipping by an activist as soon as it reaches the 5 percent disclosure threshold until it files a 13D," drawing on the concepts and authority in Rule 14e-3. *See* Gordon June 20, 2022 Comment at 4 n.5 (citing 17 C.F.R. 240.14e-3). A more targeted approach of this kind may be an appropriate subject of future rulemaking in light of evidence drawn from responses to the finalization of the Proposal, and may also better make clear that the Commission's new rule under Section 13 is not intended to capture passive investors simply because they regularly meet with many market players in the course of their stewardship activities.

rules, activism has seen a large growth. The long disclosure period in the United States is an international anomaly, and the incremental changes proposed by the Commission will not meaningfully dampen the extremely active and strong U.S. markets for corporate control and for activism.

We appreciate this opportunity to submit, and the Commission's consideration of, our supplemental comments on the Release. We ask the Staff to contact any of Theodore N. Mirvis, Adam O. Emmerich, David A. Katz, or I. Andrew Mun at (212) 403-1000 should it have any questions.

Very truly yours,

Wachtell, Lipton, Rosen & Katz

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